FILED

No. 94 827 NOV 8 1994

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

KEVIN L. PIERCE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petiiton for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

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November 1994

QUESTION PRESENTED

Whether the petitioner was denied the effective assistance of counsel by his civilian counsel's unilateral decision to waive submitting post-trial matters.

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UNITED STATES OF AMERICA,

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Petiiton for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Kevin L. Pierce, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Military Appeals entered in his case on August 19, 1994.

OPINIONS BELOW

The order and judgment of the United States Court of Military Appeals, reported at 40 M.J. 149 (C.M.A. 1994) is located at Appendix A. The unreported opinion of the United States Air Force Court of Military Review, issued October 7, 1992, is found at Appendix B.

JURISDICTION

The final order of the United States Court of Military Appeals (now named the United States Court of Appeals for the Armed Forces) was entered on August 19, 1994.

The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259(3) (Supp. 1994) and 10 U.S.C.A. § 867(a) (Supp. 1994).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the Constitution of the United States provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defence.

STATEMENT OF THE CASE

During December of 1990, petitioner was tried by a general court-martial composed of officer and enlisted members at Scott Air Force Base, Illinois, for the alleged involuntary manslaughter of his daughter. Contrary to his pleas, petitioner was found guilty of the charge. He was sentenced to a bad conduct discharge, hard labor without confinement for 90 days, and reduction to Airman First Class (E-3).

The petitioner was represented at trial by a civilian defense counsel and a military defense counsel. At some time between the court-martial and service of the record of trial, petitioner and his civilian attorney discussed petitioner's right to submit matters to the convening authority so that he may grant clemency pursuant to Rule for Court Martial 1007(d)(1).

On January 16, 1991, the military defense attorney was served a copy of the Staff Judge Advocate's Recommendation to the general court-martial convening authority, as is evidenced by the executed indorsement to a service letter dated "15 Jan 1991." On the aforementioned indorsement, the military attorney wrote. "I do not intend to submit matters and/or responses to the Staff Judge Advocate's Recommendation. Mr. Rathbone may submit mat-

ters and/or responses in Sgt Pierce's behalf. He is responsible for post-trial matters." (Appendix C)

On January 17, 1991, petitioner was served with a copy of the same recommendation. In his indorsement, he clearly states, "I do intend to submit matters and/or responses to the Staff Judge Advocate's Recommendation." (Appendix D)

Sometime on or before February 4, 1991, the civilian attorney had received the same Staff Judge Advocate's Recommendation. In an addendum to the Staff Judge Advocate's Recommendation, it is noted that the civilian attorney was contacted on February 4, 1991. The civilian attorney indicated that "he wanted another day to consider whether any matters would be submitted and, if so, he would call [Mr. Parrott, the Twenty-Second Air Force Acting Director of Military Justice] on 5 February 1991," the next day. When no call came, the record of trial and the recommendation were forwarded to Major General Richard J. Trzaskoma, the convening authority, for action. (Appendix E)

The United States Air Force Court of Military Review held that action by the convening authority was timely. It further stated:

> "Appellant's failure to submit matters to the convening authority within 10 days of the record constituted a waiver of this right. Attempting to avoid this waiver rule by blaming civilian defense counsel's after-the-fact efforts is without merit."

United States v. Pierce, unpublished, ACM 29116, (A.F.C.M.R. 7 October 1992) (Appendix B)[1].

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[1] A second issue was presented to the Air Force Court of Military Review regarding the fact that the same convening authority who impaneled the court and was to take any action had denied petitioner's request for medical testing to determine if a congenital defect existed in the victim which could have contributed to the death. The Court of Military Appeals did not grant review on this issue.

The United States Court of Military Appeals granted review of the decision of the Air Force Court of Military Review. In that opinion, the Court of Military Appeals held that the petitioner was not denied effective assistance of counsel. Any error by civilian counsel in waiving appellant's right to submit post-trial matters to the convening authority had not been shown to be prejudicial. *United States v. Pierce*, 40 M.J. 149 (C.M.A. 1994) (Appendix A).

REASONS FOR GRANTING THE WRIT

Petitioner's case raises important questions concerning the Sixth Amendment right to counsel in post-trial proceedings. It is axiomatic in military and civilian law that an accused is entitled to effective assistance of counsel throughout the entire trial, post-trial, and appellate process.

The Sixth Amendment of the United States Constitution guarantees an accused the right to "effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). The same right is afforded to servicemen in trials by court-martial under Article 27(b), Uniform Code of Military Justice; 10 U.S.C. § 827(b). *United States v. Dicupe*, 21 M.J. 440 (C.M.A. 1986); *United States v. Rivas*, 3 M.J. 282 (CM.A. 1977); *United States v. Mansfield*, 24 M.J. 611 (A.F.C.M.R. 1987). An accused has a right to a reasonably competent counsel who exercises that competence in his client's behalf throughout the trial *United States v. Jefferson*, 13 M.J. 1 (C.M.A. 1982).

This Honorable Court has set out a two-part standard to determine whether an individual has been denied the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 669 (1984). An appellant must identify acts or omissions by his or her attorney, and then bear the burden of persuading the court that, based on the facts

as counsel knew them and eliminating the distortion of hindsight, those acts or omissions ". . . were outside the range of professional competent assistance." *Id.*, at 689. Justice O'Connor cautioned that appellate courts must understand that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. *Id.* An appellant must also show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A "reasonable probability" was defined as a "probability sufficient to undermine confidence in the outcome." *Id.*, at 694.

In *United States v. Stephenson*, 33 M.J. 79 (C.M.A. 1991), the Court of Military Appeals found ineffective assistance of counsel and set aside the action of the convening authority where the civilian defense counsel failed to present a petition for clemency and other favorable sentencing matters to the convening authority. The Court of Military Appeals in *Stephenson, citing United States v. Bono*, 26 M.J. 240, 243 n.3 (C.M.A. 1988) emphasized the fact that review of a court-martial at the convening authority level provides *"the accused's best hope for sentence relief"*, 33 M.J. at 83. *See also United States v. Holt*, 33 M.J. 400 (C.M.A. 1991), where the Court of Military Appeals also found inadequate assistance of counsel where the civilian defense counsel "waived his opportunity to present any response to the staff judge advocate's recommendation to the convening authority." 33 M.J. at 411. *See also United States v. Shaw*, 30 M.J. 1033 (A.F.C.M.R. 1990) where the Air Force Court of Review set aside a convening authority action when it appeared that defense counsel had unilaterally waived his client's right to submit post-trial matters to the convening authority.

The scenarios in the *Stephenson* and *Holt* cases *supra* are almost identical to the facts in the case *sub judice*. Sgt Pierce notified HQ 22 AF/JA that he intended "to

submit matters and/or responses to the Staff Judge Advocate's Recommendation." *See* Indorsement to Col Sweeney's 15 January 1991 Ltr, Allied Papers (Appendix D). The only other relevant document in the record subsequent to that indorsement is the Addendum to the SJA recommendation (Appendix E), which appears to indicate that the civilian defense counsel was personally making the decision about whether any matters would be submitted. The civilian attorney apparently told Mr. Parrott, the author of the SJA Addendum, that "*he* wanted another day to consider whether any matters would be submitted and, if so, *he* would call. . . ." Addendum, Allied Papers (emphasis added). As such, it seems clear from the record that the civilian attorney unilaterally decided that no matters would by submitted *after* petitioner initially expressed a desire to do so.

Indeed, the petitioner's letter to the Court of Military Appeals submitted by separate motion pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982) makes it crystal clear that petitioner desired that matters be submitted to the convening authority and he relied upon his civilian counsel to submit those matters on his behalf. (Appendix F). In fact, the appellant had no idea that no matters were submitted to the convening authority by his civilian counsel until after the convening authority had acted upon his case. The decision to waive this post-trial right, either by written waiver or inaction, belongs to appellant, not his lawyer.[2]

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[2] The letter of petitioner, dated January 27, 1994, was submitted with attachments via motion to the Court of Military Appeals on February 16, 1994. The Court accepted the documents over government opposition on March 4, 1994. (Appendix G). Chief Judge Sullivan of the Court of Military Appeals noted that in this case "there [was] a factual dispute as to whether defense counsel, unilaterally and contrary to appellant's wishes, waived appellant's right to submit matters to the convening authority prior to his action." *Pierce*, 40 M.J. 150-151. A resolution of this dispute was warranted and could have been achieved by ordering a hearing

The Air Force Court of Military Review cannot be absolved for totally ignoring the import of the *Stephenson* and *Holt* decisions in finding that appellant's failure to submit matters to the convening authority within 10 days of the service of the record upon him constituted a waiver of this right.

Moreover, the Air Force Court's citation to *United States v. Shaw*, 30 M.J. 1033 in its decision to deny relief is puzzling as the *Shaw* decision unequivocally supports petitioner's position. In *Shaw*, the accused, like the petitioner in the case *sub judice*, completed an indorsement to his receipt of the SJA Recommendation which indicated that he desired to submit matters to the convening authority. In *Shaw*, the defense counsel, like the defense counsel in the case *sub judice*, unilaterally waived the appellant's right to submit matters to the convening authority. The only difference being that the defense counsel's unilateral waiver in *Shaw* was written while the waiver in the current case occurred by inaction. Nonetheless, the effort on the respective appellants was the same. They were each denied the opportunity to submit matters to the convening authority.

In *Shaw*, the Air Force Court returned the case to the convening authority for a new action. However, most inconsistently in the current case the same Court, albeit a different panel, citing *Shaw* held that appellant waived his right to submit matters to the convening authority.

The fact of the matter is that the petitioner had a right to rely upon his defense counsel to submit clemency matters on his behalf. Indeed, the petitioner's lack of understanding of the post-trial process and his total reliance on his defense counsel to tend to these matters was vividly

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under the authority of *United States v. Dubay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967). *See United States v. Fullard*, unpublished, ACM S28698 (A.C.M.R. 4 October 1993) (James, J. dissenting).

demonstrated on the record by the following exchange between the petitioner and the military judge:

> MJ: Do you have any questions about your post-trial and appellate rights?
>
> ACC: *I'm not sure exactly how it works out,* but I can talk to Captain Elliott.

(R. 331, emphasis added)[3].

The decisions in *Stephenson* and *Holt* make clear that the Court of Military Appeals does not view the convening authority as a "rubber stamp" and will vigorously safeguard the right of an accused to have the effective assistance of counsel at this stage of the proceedings.

Where a counsel is relied upon by an accused to submit matters to the convening authority, as the record in this case has amply shown, and where that counsel waives this opportunity without any evidence that this waiver was with the informed consent of the accused, the courts should continue to find that the accused was deprived the effective assistance of counsel at this important stage of the process.

Counsel can easily protect themselves in this area by obtaining a written waiver from their client in those cases where the client truly does waive the submission of matters to the convening authority. It is not coincidental that no such waiver was obtained from the petitioner in this

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[3] Despite direction by Rule for Court Martial 1010, the military judge failed to ensure that the accused received written notification of his post-trial and appellate rights. The relevant portion of Rule states, "In each general and special court-martial, prior to adjournment, the military judge shall ensure that the defense counsel has informed the accused orally and in writing of: (a) The right to submit matters to the convening authority to consider before taking action. . . . The written advice to the accused concerning post-trial and appellate rights shall be signed by the accused and the defense counsel and inserted in the record of trial as an appellate exhibit."

case—this petitioner desired that his counsel submit matters and was told that such matters would be submitted.

While the bulk of the case law would appear to favor a showing of actual prejudice in these situations, the petitioner respectfully submits that, in a due process sense, the prejudice is automatic when an accused has been denied the opportunity to participate during such an important step of the process. In *United States v. Narine*, 14 M.J. 55, 57-58 (C.M.A. 1982), the Court of Military Appeals, in deciding that certain matters contained in an Addendum to an SJA Recommendation constituted new matters and should have been served on the accused, stated:

> It dilutes the curative effect of *Goode*[4] to ignore the lack of input from the defense counsel and to examine the new material for possible prejudice at the appellate level neither substitutes for the input of defense counsel nor avoids the appellate case load that *Goode* was designed to reduce. *"The mere fact that upon appeal harm to the accused may be found nonexistent, in no sense lessens the obligation to see that he receives those benefits that are rightly his."* *United States v. Roop*, 16 U.S.C.M.A. 612, 615, 37 C.M.R. 232, 235 (1967), quoted with approval in *United States v. Hill, supra* at 397.

(Emphasis added). This analysis is equally compelling in the case *sub judice*.

See also, United States v. Norment, 34 M.J. 224, 227 (C.M.A. 1992), and *United States v. Moseley*, 35 M.J. 481, 484-485 (C.M.A. 1992), where the Court of Military Appeals set aside the actions of the respective convening authorities without requiring a concrete showing of actual prejudice due to the government's failure to fully observe the post-trial rights of each appellant In *Moseley*, the Court of Military Appeals held:

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[4] *United States v. Goode*, 1 M.J. 3 (C.M.A. 1975).

> . . . Where there effectively was an *absence* of counsel functioning on behalf of an accused, our consideration of harmlessness is limited to whether subsequently afforded counsel was able to make up for the earlier deprivation. [citations omitted]. Any broader approach turns an examination for harmlessness into a speculative venture without perimeter.
>
> Here, recognizing the importance that this Court always has placed on the convening authority's exercise of wide discretion, the only way to make up for the *absence* of counsel at that stage is to re-do that stage with benefit of counsel acting in appellant's interests.

Id., at 484-485. While the absence of counsel in *Moseley* was literal, for all practical purposes the petitioner's counsel was equally "absent" when he failed to submit matters to the convening authority on petitioner's behalf despite promising to do so.

Assuming *arguendo* that there is a requirement to show actual prejudice in these situations, which admittedly, may be the better approach, the petitioner respectfully submits that he has demonstrated actual prejudice in this case. In *United States v. Brown*, ACM 30296 (recon) (A.F.C.M.R. 2 August 1993), Judge James, in his usual meticulous and thorough manner, provides a detailed analysis of the relevant case law and the applicable requirements for demonstrating prejudice in such situations:

> It has been held that an appellant must aver that he intended to submit something before he may have relief on an assignment that he was thwarted. *United States v. DeGrocco*, 23 M.J. 146, 148 (C.M.A. 1987) ("accused must make some showing that he would have submitted material"); *United States v. Skaar*, 20 M.J. 836, 840 (N.M.C.R. 1985) (en banc) ("appellant bears the burden of at least asserting a colorable claim that he intended to timely submit . . . material"); *see also United States v. Curry*,

31 M.J. 359, 377 (C.M.A. 1990) (appellant who complains of ineffectiveness of counsel during post-trial period did not aver that he intended to submit something, had he had the needed help); *United States v. Robertson,* 34 M.J. 1206, 1211 (A.F.C.M.R. 1992), 39 M.J. 211, 218 (C.M.A. 1944) (same); *United States v. Calderon,* 34 M.J. 501, 504 (A.F.C.M.R. 1991), *pet. denied,* 36 M.J. 33 (C.M.A. 1992) (same); *United States v. Evans,* 31 M.J. 927, 931 (A.C.M.R. 1990); *cf. United States v. Hilow,* 32 M.J. 439, 445 n.2 (C.M.A. 1991) (Cox, J., dissenting in part). There is otherwise no showing of prejudice, *United States v. Curry,* 31 M.J. 359, 376-77 (C.M.A. 1990); Article 59(a), UCMJ, 10 U.S.C. § 859(a) (1988).

The petitioner *has* asserted that he wished to submit matters to the convening authority but relied upon his civilian counsel's representations to submit the matters on his behalf. *See* petitioner's January 27, 1994 statement (Appendix F) accepted for consideration by motion by the Court of Military Appeals by motion dated March 4, 1994 (Appendix G). The clear import of the appellant's statement, although he did not specifically state this, is that he would have submited matters to the convening authority if he knew his civilian counsel was not going to do it for him. *Id.* As such, the appellant respectfully submits that he has sufficiently demonstrated actual harm in this case.

CONCLUSION

A clear understanding of what constitutes ineffective assistance of counsel, denial of counsel, and the difference between the two is crucial to an understanding of the Sixth Amendment right to counsel, as it applies to the post-trial sentencing process. The resolution of this case will settle the question of whether counsel's abandonment of duties during the post-trial process constitutes ineffective assistance of counsel.

Respectfully submitted,

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November 1994

APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 93-0185

CMR No. 29116

UNITED STATES,

Appellee

v.

KEVIN L. PIERCE,
Sergeant U.S. Air Force,

Appellant.

Argued March 1, 1994

Decided Aug. 19, 1994

For Appellant: *Major George F. May* (argued); *Colonel Jay L. Cohen* (on brief); *Colonel Terry J. Woodhouse.*

For Appellee: *Major John H. Kongable* (argued); *Colonel Jeffrey T. Infelise* (on brief).

Opinion of the Court

SULLIVAN, Chief Judge:

During December of 1990, appellant was tried by a general court-martial composed of officer and enlisted members at Scott Air Force Base, Illinois. Contrary to his pleas, he was found guilty of involuntary manslaughter

of his infant daughter, in violation of Article 119, Uniform Code of Military Justice, 10 USC § 919. On December 7, 1990, he was sentenced to a bad-conduct discharge, hard labor without confinement for 90 days, and reduction to E-3. On February 11, 1991, the convening authority approved the adjudged sentence. On October 7, 1992, the Court of Military Review affirmed the findings of guilty and the sentence in an unpublished opinion.

This Court, on August 18, 1993, granted review on the following question of law assigned by appellate defense counsel:

> WHETHER APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS CIVILIAN COUNSEL'S UNILATERAL DECISION TO WAIVE SUBMITTING POST-TRIAL MATTERS TO THE CONVENING AUTHORITY.

We hold that appellant was not denied effective assistance of counsel. Any error by civilian counsel in waiving appellant's right to submit post-trial matters to the convening authority has not been shown by appellant to be prejudicial. *United States v. DeGrocco*, 23 MJ 146 (CMA 1987). *Cf. United States v. Holt*, 33 MJ 400, 411-12 (CMA 1991) and *United States v. Stephenson*, 33 MJ 79, 82-83 (CMA 1991).

The Court of Military Review found the following facts concerning the granted issue:

> Appellant's civilian defense counsel indicated he would be responsible for post-trial matters. In receipting for the Staff Judge Advocate's Recommendation, appellant indicated he intended to submit matters to the convening authority. The record of trial was served on appellant and after over 10 days elapsed without any submissions from appellant or his civilian counsel, a call was placed to his civilian defense counsel to determine whether they desired

> a further delay of final action. Based upon a conversation with the civilian defense counsel, an additional day's delay was approved. Final action was taken by the convening authority after the 10-day time period for submissions and after the extra day's delay provided to appellant's civilian counsel. Appellate defense counsel assert the action by the civilian defense counsel waiving submissions was unilateral and not the decision of appellant. Appellant's failure to submit matters to the convening authority within 10 days of the service of the record upon him constituted a waiver of this right. Attempting to avoid this waiver rule by blaming civilian defense counsel's after-the-fact efforts is without merit. We find the convening authority's final action on this case was timely. *United States v. Shaw*, 30 MJ 1033 (AFCMR 1990); *United States v. Euring*, 27 MJ 843 (ACMR 1989); RCM 1105(c)(1), 1105 (d)(1).

Appellate government counsel filed a statement with this Court from civilian defense counsel on January 12, 1994, stating:

> COMES NOW Eric Rathbone, and states that the following is true:
>
> Several days after the trial ended, Mr. and Mrs. Pierce, my secretary, and I had dinner together. At that time, Mr. Pierce indicated he was satisfied with the results of the trial and that he did not wish to proceed with any further action. Following our dinner, Mr. Pierce changed residency and after several attempts to contact him including leaving messages with his wife I received no response and eventually gave up trying.

Appellant defense counsel subsequently filed letters and other documents from appellant, his wife, and brother disputing the representations of Mr. Rathbone.

. . .

Appellant's claim of ineffective assistance of counsel is based on the Sixth Amendment and Article 27(b), UCMJ, 10 USC § 827(b). He asserts that civilian counsel's failure to "present a petition for clemency and other favorable sentencing matters to the convening authority" (Final Brief at 4) after he (appellant) earlier indicated an intent to do so was unreasonable professional conduct for an attorney. Moreover, he argues that such conduct should be presumed prejudicial because it denied him his best hope of securing sentence relief, *i.e.*, clemency action by his concening authority. *United States v. Moseley*, 35 MJ 481, 484-85 (CMA 1992)); *United States v. Narine*, 14 MJ 55, 57-58 (CMA 1982). In the alternative, he asserts that his letter to this Court on February 22, 1993, impliedly indicates such clemency matters exist and, thus, his lawyer's inaction specifically prejudiced him.

A finding of ineffective assistance of counsel requires a showing of deficient professional conduct and a showing that such conduct prejudiced appellant. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *United States v. Holt*, 33 MJ at 409. Here, there is a factual dispute as to whether defense counsel, unilaterally and contrary to appellant's wishes, waived appellant's right to submit matters to the convening authority prior to his action. *See generally United States v. Goode*, 1 MJ 3 (CMA 1975); and RCM 1106(f), Manual for Courts-Martial, United States, 1984. We are not a factfinding body (Art. 67(c), UCMJ, 10 USC § 867(c) (1989)); accordingly, we cannot resolve appellant's claim on the basis that the evidence of record shows his defense counsel's conduct was reasonable. *Cf. United States v. Curry*, 31 MJ 359, 376-77 (CMA 1990). *See generally United States v. Smith*, 36 MJ 455 (CMA 1993); *United States v. Parker*, 36 MJ 269 (CMA 1993) (hearing under *United States v. DuBay*, 17 USCMA 147, 37 CMR 411 (1967), may be required to determine factual questions concerning post-trial claims of ineffectiveness of counsel).

Nevertheless, it is uncontroverted that appellant was represented by counsel after his trial and that counsel was served with the post-trial recommendation. *Cf. United States v. Moseley, supra* at 485 (failure to serve defense counsel with post-trial recommendation deprived accused of counsel). In these circumstances we have normally required a showing of prejudice before granting relief based on a premature convening authority action. *United States v. Johnson,* 23 MJ 327 (CMA 1987); *United States v. DeGrocco,* 23 MJ 146 (C.M.A. 1987). In the absence of a finding of total abandonment by defense counsel, we see no reason to depart from this prejudice rule in resolving appellant's unauthorized counsel-waiver claim.

We finally note that there is no offer of proof, even at this late stage of the proceedings, as to the particular nature of the materials that appellant or counsel would or could have submitted to the convening authority. *United States v. Robertson,* 39 MJ 211 (CMA 1994). Vague or general intimations in this regard will not suffice. *See also United States v. Craig,* 28 MJ 321, 325 (CMA 1989). Accordingly, any error in counsel's failure to secure appellant's approval of the waiver action has not been shown to be prejudicial so as constitute a denial of his right to effective assistance of counsel. *See also United States v. Demerse,* 37 MJ 488, 490-91 (CMA 1993) (record establishes that defense counsel's unreasonable conduct at trial not prejudicial).

The decision of the United States Air Force Court of Military Review is affirmed.

Judges COX, CRAWFORD, GIERKE, and WISS concur.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

UNITED STATES

v.

Sergeant KEVIN L. PIERCE, FR333-64-3758
UNITED STATES AIR FORCE

ACM 29116

7 October 1992

Sentence adjudged 7 December 1990 by GCM convened at Scott Air Force Base, Illinois. Military Judge: Perry L. Anderson.

Approved sentence: Bad-conduct discharge, 90 days hard labor without confinement, and reduction to E-3.

Appellate Counsel for the Appellant: Colonel Jeffrey R. Owens and Major Beverly B. Knott.

Appellate Counsel for the United States: Colonel William R. Dugan, Jr., Major Paul L. Blackwell, Jr., Major Jeffrey C. Lindquist, and Captain James B. Wager, Jr.

Before

O'HAIR, SNYDER, and GRUNICK
Appellate Military Judges

PER CURIAM:

Appellant was convicted contrary to his pleas by a general court-martial composed of officers and enlisted members of involuntary manslaughter of his infant daughter in violation of Article 119, UCMJ. The convening authority approved his sentence of a bad-conduct discharge, hard labor without confinement for 90 days, and reduction to E-3. We find no error in the two assertions submitted by appellant and affirm.

The appellant asserts the convening authority improperly denied his request to obtain potentially exculpatory medical evidence before trial and after trial prematurely took final action on his case. Under both assertions, appellant's failure to follow-up with a timely motion at trial on his evidentiary request, and the 10-day lapse of time for submissions to the convening authority under R.C.M. 1105 and 1106, result in a waiver of these issues.

We do not find the convening authority abused his discretion in denying appellant's request for medical tests on appellant and his wife. The proper avenue to pursue this request would have been in the form of a motion before the military judge to compel government testing. The military judge was never asked to rule on this issue. Appellant, on his own, had a major portion of the requested testing completed and admitted during the presentation of his case. The desired defense evidence was speculative, and tests accomplished by appellant did not substantiate his hoped for theory. Whether the government is obliged to conduct scientific testing could have formed the basis for a renewal of the request before the military judge. In the absence of such a motion to the military judge, we find this assertion lacks merit. *United States v. Means*, 24 M.J. 160 (C.M.A. 1987); *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986); *United States v. Hargrove*, 33 M.J. 515 (A.F.C.M.R. 1991); R.C.M. 703(c)(2)(D), 703(d).

Appellant's civilian defense counsel indicated he would be responsible for post-trial matters. In receipting for the Staff Judge Advocate's Recommendation, appellant indicated he intended to submit matters to the convening authority. The record of trial was served on appellant and after over 10 days elapsed without any submissions from appellant or his civilian counsel, a call was placed to his civilian defense counsel to determine whether they desired a further delay of final action. Based upon a conversation with the civilian defense counsel, an additional day's delay was approved. Final action was taken by the convening authority after the 10-day time period for submissions and after the extra day's delay provided to appellant's civilian counsel. Appellate defense counsel assert the action by the civilian defense counsel waiving submissions was unilateral and not the decision of appellant. Appellant's failure to submit matters to the convening authority within 10 days of the service of the record upon him constituted a waiver of this right. Attempting to avoid this waiver rule by blaming civilian defense counsel's after-the-fact efforts is without merit. We find the convening authority's final action on this case was timely. *United States v. Shaw,* 30 M.J. 1033 (A.F.C.M.R. 1990); *United States v. Euring,* 27 M.J. 843 (A.C.M.R. 1989); R.C.M. 1105(c)(1), 1105(d)(1).

The approved findings of guilty and the sentence are correct in law and fact and, on the basis of the entire record, are

AFFIRMED.

[SEAL]

/s/ Naomi D. Allen
TSgt, USAF
Chief Court Administrator, AFCMR

APPENDIX C

[DOD LOGO]

DEPARTMENT OF THE AIR FORCE
Headquarters Twenty-Second Air Force (MAC)
Travis Air Force Base, California 94535-5002

[15 Jan. 1991]

Reply to Attn of JA

Subject: Staff Judge Advocate's Recommendation—
U.S. v Sgt Kevin L. Pierce

To: Capt Baxter Elliott
HQ USAF Judiciary/ADC
Scott AFB, IL 62225

1. In compliance with Rule for Courts-Martial 1106 and AFR 111-1, paragraph 15-6, the attached Recommendation is submitted for your examination and comments, if any. Immediately upon your receipt of this letter, please call our office to advise of its arrival (DSN 837-2508), complete the indorsement below, and then return this letter to us.

2. You have ten days to respond to matters within this Recommendation. In addition, you may submit to the Convening Authority any written matters which may reasonably tend to affect the Convening Authority's decision whether to disapprove any findings of guilty or approve the sentence. If you fail to respond within these time limits, the Recommendation will be submitted to the Convening Authority without your comments. The accused is not required to raise objections to the trial proceedings in these comments in order to preserve them for later review.

3. I request that you send any response you may have to my recommendations by the most expeditious means available.

/s/ Howard P. Sweeney
HOWARD P. SWEENEY
Colonel USAF
Staff Judge Advocate

Atch

1st Ind

To: HQ 22 AF/JA

The attached Staff Judge Advocate's Recommendation in the subject case was received by me on 16 Jan. 1991. I (do not) intend to submit matters and/or responses to the Staff Judge's Recommendation. Mr. Rathbone may submit matters and/or responses in Sgt Pierce's behavior. He is responsible for post-trial matters.

/s/ Baxter Elliott
BAXTER ELLIOTT
Capt, USAF
Defense Counsel

APPENDIX D

[DOD LOGO]

DEPARTMENT OF THE AIR FORCE
Headquarters Twenty-Second Air Force (MAC)
Travis Air Force Base, California 94535-5002

Reply to Attn of JA [15 Jan. 1991]

Subject: Staff Judge Advocate's Recommendation—
U.S. v Sgt Kevin L. Pierce

To: Sgt Kevin L. Pierce
375th Transportation Squadron
Scott AFB, IL 62225

1. In compliance with Rule for Courts-Martial 1105 and AFR 111-1, the attached Recommendation is submitted for your examination and comments, if any. Please complete the indorsement below immediately upon receipt and return this letter to us in the envelope provided. A copy of this Recommendation has also been sent to your defense counsel.

2. You and your defense counsel have ten days to respond to matters within this Recommendation. In addition, you may submit to the Convening Authority any written matters which may reasonably tend to affect the Convening Authority's decision whether to disapprove any findings of guilty or approve the sentence. If you fail to respond within these time limits, the Recommendation will be submitted to the Convening Authority without your comments. You and your counsel are not required to raise objections to the trial proceedings in these comments in order to preserve them for later review.

3. I request that you send any response you may have to my recommendations by the most expeditious means

available. If you have any questions, please contact your defense counsel.

/s/ Howard P. Sweeney
HOWARD P. SWEENEY
Colonel USAF
Staff Judge Advocate

2 Atchs
1. Recommendation
2. Envelope

1st Ind

To: HQ 22 AF/JA

The attached Staff Judge Advocate's Recommendation in the subject case was received by me on 17 Jan. 1991. I (do) intend to submit matters and/or responses to the Staff Judge Advocate's Recommendation.

/s/ Kevin L. Pierce
KEVIN L. PIERCE
Sgt, USAF

APPENDIX E

11 February 1991

Addendum to the Staff Judge Advocate's Recommendation—*U.S. v Sgt Kevin L. Pierce*

1. The accused's military defense counsel acknowledged receipt of a copy of the Recommendation on 16 January 1991. The accused acknowledged receipt of his copy on 17 January 1991. The accused was served with his copy of the Record of Trial on 22 January 1991. On 4 February 1991, I called the accused's military defense counsel, who indicated, as he had in his indorsement to our letter transmitting the SJA's Recommendation, that the civilian defense counsel, Mr. Rathbone, was handling clemency matters on his own. I also called Mr. Rathbone on 4 February 1991, and he acknowledged that he had received a copy of the Recommendation. He indicated that he wanted another day to consider whether any matters would be submitted and, if so, he would call me on 5 February 1991. He did not call on 5 February 1991. In as much as ten days have passed since the accused was served with his copy of the Record of Trial and the SJA's Recommendation, matters are now untimely.

2. I, therefore, continue to agree with the conclusions and recommendations contained at paragraphs 39 and 40 of the Recommendation.

/s/ Gregory G. Parrott
GREGORY G. PARROTT
Attorney-Advisor
Acting Director of Military Justice

I concur.

/s/ Howard P. Sweeney
HOWARD P. SWEENEY
Colonel, USAF
Staff Judge Advocate

APPENDIX F

January 27, 1994

To whom it may concern,

This letter is in rebuttal of a statement made by Mr. Eric Rathbone, my civilian attorney for my Court Martial held 3-7 December 1990. His statement says that several days after the trial ended that he and his secretary had dinner with my wife and myself, and that at that time, I indicated that I was satisfied with the trial results and did not wish to proceed with any further action. This is simply not true. We did go out to dinner with Mr. Rathbone and his secretary, and also my brother and his girlfriend went with us to that dinner. We did not discuss the appeal and that was not the reason for going to dinner with them. We would not go to a restaurant to openly discuss my appeal in front of a crowd.

Also Mr. Rathbone was well aware that we did not think it was fair that we could not have any medical tests done on base and had been tested off base at our own expense. He knew that we wanted that information submitted on appeal and was supposed to take care of it. It was not easy paying for those tests. We paid most of the bills by borrowing money and taking credit card cash advances to cover the costs. Mr. Rathbone was also well aware that our off base doctor had tested us and discovered that we were both testing positive for syphilis, had sent us to another professional lab to rule out syphilis, and concluded that in fact we did not have syphilis and that there was a valid reason that we were both testing positive. He found it odd that we were both testing positive to this test and concluded that to continue testing would be very expensive. We had no more money, so our co-counsel, Capt. Baxter O. Elliot, put in a request to the base legal office asking that we be allowed to continue the testing on base. The request was denied by Gen. Trzaskoma, who also is the same person who approved the findings of the court martial.

He (Mr. Rathbone) also stated that following our dinner, we (my wife and myself) changed residency and after several attempts to contact us, including leaving message with my wife, eventually gave up trying. This is also not true. If he did not know where we were living he could not have left several messages with my wife. In fact, we continued living in our on base quarters at 5337 C Hesse Ave until April 1991, which at that time I began my appellate review and moved off base. Enclosed are documents showing that we moved on base on 14 March, 1988. Another enclosed documents shows that we were living at the same on base residence on 13 June, 1990. One other enclosed document shows that after 11 May 1991, which is several months after the dinner, that we be given one week to vacate our on base quarters. After we vacated our on base quarters in May 1991, we moved to 109 F Glen Addie Blvd in Belleville, Illinois. Mr Rathbone had that address as well. Enclosed is a copy of Scott Credit Union check #152 showing that we paid Mr. Rathbone a payment on 09 August, 1991. The check had our new address on it, and this was eight months after the trial. The copy is of our carbon copy, so it is not easily readable, but says that our address is 109 F Glen Addie Blvd, Belleville, IL. It has my social security number, 333-64-3758. It is payable to Eric Rathbone for the amount of $50.00. It also has our account number, 716416, and the date 09 Aug 1991.

If this copy (of the check) is not sufficiently readable I believe that Scott Credit Union would be able to supply a micro-fiche copy of this check upon request. Their address is:

Scott Credit Union
W. Winters & J. Streets, Scott AFB, IL 62225

Enclosed with this letter are seven copies of documents, labeled "Copy 1" thru "Copy 7" and a description of those documents appear below:

Copy 1—Copy of check to Mr. Rathbone 9 Aug, 1991

Copy 2—Copy of Gen. Trzaskoma's disapproval of medical tests.

Copy 3—Copy of 14 Mar 1988 move to on-base housing

Copy 4—Copy showing we were at same on base location on 13 June 1990, at which time we were working with Mr. Rathbone and that he had known our address on base during the entire case.

Copy 5—Copy showing that we continued to occupy these same on base quarters until May of 1991, which was several months after the trial.

Copy 6—A letter from wife stating facts about the dinner and my desire to submit matters for appeal.

Copy 7—A letter from my brother stating that he was at the dinner and whether or not we discussed any appeal matters at that dinner.

Thank you for allowing me to submit this information. This information that I have submitted is completely true. I would like to state once again that I did not at any time say that I did not wish to submit appeal information. It was never my intention to give up my rights for something that I believe is very important. Thank you for considering this information.

Sincerely,

/s/ Kevin L. Pierce
KEVIN L. PIERCE

APPENDIX G

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 93-0185/AF
CMR Dkt. No. 29116

UNITED STATES,

Appellee

v.

KEVIN L. PIERCE,
(333-64-3758),

Appellant

ORDER

On consideration of appellant's motion to submit documents, it is, by the Court, this 4th day of March, 1994.

ORDERED:

That said motion is hereby granted.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (MAY)
Appellate Government Counsel (KONGABLE)

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